Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
UNITED STATES OF AMERICA
No. 77-1015

OCTOBER TERM 1977

RONALD PRATE, LEONARD LA ROSA, PATRICIA PLUMERI, PATRICIA A. DOYLE, THERESA YOUNG, TERRENCE P. ANDERSON, MICHAEL A. DIGIOVANNI, GARY GENNARINO, MICHAEL C. KELLER, CHARLES J. ZONA, JOSEPH P. TANTALO, MICHAEL PERRY, SAMUEL T. GERMANO, RONALD S. ZAVAGLIA, CAROL TSCHIDERER and THOMAS A. TSCHIDERER,

Petitioners,

-vs-

ELISHA FREEDMAN, CITY MANAGER OF THE CITY OF ROCHESTER, NEW YORK; THOMAS HASTINGS, CHIEF OF POLICE OF THE CITY OF ROCHESTER POLICE DEPARTMENT; MEMBERS OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION; and EXECUTIVE DIRECTOR OF THE COUNTY OF MONROE CIVIL SERVICE COMMISSION,

Respondents,

-vs-

JOHN HOWARD, JOHN WYCHE and JOHNNY SMITH,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO
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Petitioners submit this reply to Respondent's brief in opposition to the request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on October 20, 1977.

Respondent's brief in opposition to the Petition for the Writ of Certiorari severely understates and fails to disclose the history of the instant action. The law suit entitled "Johnny Howard, et al., v. Elisha Freedman, et al." 74 Civ. 234 (W.D.N.Y.) is referred to as an action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000(e) et seq." (brief in opposition at p. 25) when, in fact, it embodied six different causes of action under the 14th Amendment to the United States Constitution, the Civil Rights Acts of 1870 and 1871, Title VI and VII of the Civil Rights Act of 1964 and regulations promulgated by the United States Department of Justice. Citation of Oatis v. Crown Zellerbach Corp., 398 F 2d 496, 498 (Fifth Cir. 1968) and Alexander v. Gardner-Denver Company, 415 U.S. 36, 44 (1974) as authority for the promotion of settlement of Title VII actions addresses only the Title VII cause and

is of no consequence to those remaining.

In their treatment of the applicability of Washington v. Davis, 427 U.S. 229 (1976) to the Howard action, Respondents state at page 25 of their brief:

> "This Court's decision in Washington discusses only the Constitutional standard for adjudication of employment discrimination and does not apply to cases, such as Howard, which were brought under Title VII."

This is a plain distortion of the facts. The standard of invidious discrimination set forth in Washington is entirely applicable to the Howard constitutional claims. Apparently, the strength of Respondent's argument lies in their emphasis of the Title VII aspect of the Howard action but to refer to Howard as a Title VII action is evidence of the weakness of Respondents' position.

Moreover, Respondents have devoted an entire section of their brief to the jurisdictional prerequisites for the commencement of a Title VII action. Without citation of authority, Respondents request this Court to consider an alleged lack of subject matter jurisdiction below. The District Court did not dismiss upon this ground and review is, accordingly, inessential. It should be remembered that the consolidated Prate-Zavaglia action consisted of six separate causes of action, only one of which sought Title VII relief. Again, there is a misleading focus on Title VII which confuses the real issues being presented to this Court.

In their cursory dismissal of the significance of Bakke v. Regents of University of California, 132 Cal. Rptr. 680, 553, P.2d 1152 (1976), cert granted. 97 S.Ct. 1098 (1971), Respondents recite the following language from the Howard consent order:

> "The hiring mechanism set forth in paragraphs 2 and 3 is a temporary measure pursuant to Federal law to remedy the racially

disproportionate impact of
prior employment practices."
(Petition at B-8)

To recite, however, that an order is temporary in effect does not make it so. To make the conclusory pronouncement of the existence of past discrimination without any showing thereof, a hearing on the merits, findings of fact and an opportunity to be heard and to then fashion a remedy far broader than the alleged evil, which is itself unknown in proportion, is contrary to all authority within the Second Circuit and between Circuits. This is the issue which needs resolution by this Court and is unanswered by Respondents in the brief in opposition because there exists no precedent for such sweeping remedial relief.

Respondents brief in opposition is replete with a reiteration of rhetoric. In the name of the orderly administration of justice, final judgments and an end to litigation, Petitioners have been denied their right to procedural due

process. Petitioners have asked to be heard on a new and separate issue and have been estopped by a non-final, non-litigated judgment upon which they were not heard. It is not Petitioners who have failed to comply with proper procedure.

Petitioners do not dispute that "the efficient and fair administration of justice requires that litigation of an issue at some point come to an end." Class v. Norton, 505 F2d 123, 125 (Sec. Cir. 1974). The point, however, at which litigation ends must not occur before fairness and propriety have been adjudicated. If the decision of the United States Court of Appeals for the Second Circuit is permitted to stand, fundamental constitutional rights will have been forfeited in the name of order and efficiency within the administration of justice. It is respectfully submitted that the theory of finality of litigation was not intended to be so misapplied.

For the foregoing additional reasons, it is respectfully requested that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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